HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 26 Oct 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	D2/2021
File Title:	The Queen v. Rolfe
Registry:	Darwin
Document filed:	Form 27A - Applicant's Note in answer to High Court's questi
Filing party:	Applicant
Date filed:	26 Oct 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

D2 OF 2021

BETWEEN:

THE QUEEN
Applicant
and
ZACHARY ROLFE
Respondent

10

APPLICANT'S NOTE

PART I: QUESTIONS

1. On 18 October 2021, the applicant received an email from the Senior Registrar of the Court asking the parties to address two questions, as follows:

> *Q 1: The first concerns whether the Court is being asked to provide an advisory opinion, which may be outside the scope of s 73 of the Constitution (*Saffron v The Queen *(1953) 88 CLR 523, 527-528* (***Saffron***); *but see* Mellifont v AG (Qld) *(1991) 173 CLR 289, 301-306* (***Mellifont***)).
>
> *Q 2: More particularly there may be a question about the hypothetical nature of the exercise which the Court is being asked to undertake in advance of the trial, given that the Court is being asked to entertain an appeal on the basis of assumptions as to the facts to be found by the jury; assumptions which may be reasonable but are about facts not yet found.*

20

PART II: RESPONSE

2. The applicant submits special leave should be granted, and that the Court has jurisdiction to hear and determine the appeal which raises questions of law and is not a hypothetical exercise. The Court is not being asked to given an advisory opinion but rather to address significant legal issues in the case as to the proper construction of s 148B of the PA Act and its application to the assumed facts.

<u>The Full Court's question and answer</u>

30

3. Four questions in relation to s 148B of the PA Act, together with assumed facts on which the questions were based, were referred to the Full Court by Mildren AJ pursuant to s 21 of the *Supreme Court Act 1979* (NT) on 22 and 26 July 2021: CAB 10-14; 49.

4. Section 21 of the *Supreme Court Act* provides as follows:

21 Full Court

(1) The Judge hearing a proceeding, not being a proceeding in the Court of Appeal in which the jurisdiction of the Court is exercisable by one Judge, or, if the hearing of such a proceeding has not commenced, any Judge, may refer that proceeding or part of that proceeding to the Full Court.

(2) The Full Court may:

(a) accept;

(b) decline to accept; or

(c) accept in part only,

a reference made under subsection (1) and, in any event, may make such orders and give such directions as it thinks proper in relation to, and to the procedure to be followed in, the further conduct of the proceedings or part, as the case may be, including, in a case where evidence was received before the reference, orders and directions in relation to the use, if any, to be made of that evidence.

5. Question 3, subject of the special leave application to this Court, was originally formulated as follows: "*Based upon the said assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, was he acting in the exercise or purported exercise of a power or the performance or purported performance of a function under the [PA Act] such that s 148B of that Act arises for the jury's consideration?*" (CAB 10).

6. The respondent raised at the outset of the hearing before the Full Court, in reliance on *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 that question 3 should not be answered by the Court as a mixed question of fact and law: CAB 53-54.

7. In response, the following exchange took place (CAB 56-57) (emphasis added):

Southwood ACJ: Well, it's really about [question] 3 isn't it?

Mr Edwardson: Yes.

Southwood ACJ: And whether [s] 5's in or out?

Mr Edwardson: That's right.

Southwood ACJ: So in a sense there are some legal issues in 3. It may ultimately be a matter of how that question is phrased. But the question so far as that goes is really is 5, s 5 of the *Police Administration Act* in or out. The Crown says it is out. The defence says it's plainly in. So in a sense **that issue as to whether what are the powers of the police under the *Police Administration Act*,**

are they confined to s 25 of the powers and functions or do they include s 5 and so on which is arguably a question of law so if 3 were so confined all four questions [arise] for consideration.

Mr Edwardson: May it please the court.

…

Southwood ACJ: It seems to me that's really consistent with what the High Court has said in the *DPP v JM.* In particular, I think it's about pars 13 through to 35 or something.

8. The Full Court, in the course of giving judgment, reformulated question 3 as follows: "*Based upon the ~~said~~ assumed facts, at the time the accused fired the second and third shots resulting in the deceased's death, ~~was he acting~~ would it be open to the jury to find that the accused was acting in the exercise or purported exercise of a power or the performance or purported performance of a function under the [PA Act] such that s 148B of that Act arises for the jury's consideration?*": CAB 223.

9. The parties were not given an opportunity to be heard on the terms of the reformulated question prior to it being answered. As developed below, the reformulated question did not reflect the controversy between the parties which was, as Southwood ACJ recognised in the passage above, whether a function under s 148B includes the "core functions" in s 5 of the PA Act.

10. The respondent has contended throughout the proceedings (including in this Court) that the protection afforded s 148B permits him to submit to the jury that he fired shots 2 and/or 3:

    (a) to protect Constable Eberl's life, and/or

    (b) to prevent the commission of an offence; and/or

    (c) in the exercise of the power to arrest the deceased:

    RWS [20], [25], [34], [47]-[48].

11. The applicant has contended throughout the proceedings (including in this Court) that only the third alternative (arrest) may be available to the respondent, and that the other two alternatives are not available under s 148B of the PA Act because they do not constitute the performance or purported performance of a function under the PA Act.

12. Question 3 as reformulated by the Full Court did not reflect that controversy between the parties in relation to the construction of s 148B. The issue ventilated in the Full Court was not whether it would be open for a jury to find that s 148B was available at all, but rather, whether it would be open for a jury to find that s 148B was available on the basis of the first and/or second of the alternatives listed above, being "core functions" in s 5 of the PA Act.

13. The Full Court answered that latter question in favour of the respondent.

Not an advisory opinion

14. This Court is not being asked to provide an advisory opinion, which is outside the scope of s 73 of the *Constitution*. As Toohey J observed in *Mellifont* (at p 323), an advisory opinion has been taken to mean an opinion "rendered by a court at the request of government or interested party indicating how the court would rule on a matter should adversary litigation develop." Here, the criminal trial is on foot. The trial judge has referred questions to the Full Court of the Northern Territory under s 21 of the *Supreme Court Act*. This Court is asked to resolve a controversy arising from the Full Bench's judgment, which will determine how the trial judge will instruct the jury on the operation of a statutory protection and its application to the facts of the case: see eg AWS [76]. The appeal to this Court involves *"an exercise of judicial power because the seeking and the giving of the answers constitutes an important and influential, if not decisive, step in the judicial determination of the rights and liabilities in issue in the litigation"*.[1] So much is conceded by the respondent.[2]

Not a question or answer of a hypothetical nature

15. In *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 (***JM***), this Court accepted at [24] and [30] that there was no difficulty in stating questions for a Full Court in a criminal trial using facts that are asserted by the prosecution but which are not yet agreed by the defendant: [24] and [30]. Such questions are not hypothetical even though they may be contingent upon the prosecution establishing the facts at trial to the requisite standard of proof. The Court observed that a procedure permitting reservation of questions arising before trial, by

---

1 *Mellifont* at 303.
2 Respondent's note dated 25 October 2021 at [11].

reference to the facts which the prosecution asserts it will prove at trial, did "not differ in principle or effect from the demurrer procedure": at [32]-[33].

16. At [40] and [41] this Court held that the reformulated question by the Court of Appeal (not the original questions by Weinberg J) was no more than a hypothetical question which could not be answered in the valid exercise of the judicial power of the Commonwealth, including because of the answer which that Court gave:

> *[40] The answer given by the majority in the Court of Appeal to the reformulated question served only to emphasise the question's disconnection from the facts and circumstances of the particular case. .....But because the answer given to the reformulated question was as abstract as the question itself, the answer did not expressly provide the judge reserving the question with guidance about how s 1041A, on its true construction, intersected with, and applied to, the facts and circumstances described in the case stated.*
>
> *[41] The particular legal question which arose in the prosecution of JM, before his trial began, was defined by what the judge would have to tell the jury at the end of the trial about the law and its application to the particular facts of the case. The abstract generality of the reformulated question severed that question from any issue which had arisen before the trial of JM, or would later arise during his trial. The answer given to the question did not tell the trial judge how to instruct the jury at JM's trial about what is the law which applies to the facts of the case.*

17. In the present case, the plurality's answer to question 3[3] is neither abstract nor disconnected from the facts and circumstances of the present case. To the contrary, their Honours plainly told the trial judge how to instruct the jury at the respondent's trial about the operation of s 148B of the PA Act as it applies to the facts of the case.[4]

18. Southwood ACJ and Mildren AJ were correct to observe at [6] (CAB 126-127) and [25(3)] (CAB 132) that the answer to question 3 did not involve 'hypothetical matters". (footnotes omitted):

> *[6] The content of the assumed facts and annexures do not constitute concluded facts. Nor do they constitute admissions made by the parties or agreed facts. However, the documents do contain some facts not in dispute, some facts the Crown will seek to prove at trial, and some facts the defence will press. The Court received the documents to provide a context for the resolution of the referred question. They were received on a similar basis to that approved by the High Court in Director of Public Prosecutions (Cth) v JM. The issues of law raised by the referred questions are concerned with how the law applies to the facts of this particular case. While the referred questions are contingent on facts yet to be*

---

3 CAB 207 at [204].
4 *JM* at [40]-[41].

established, the materials provided to the Court demonstrate that the referred questions are not hypothetical nor academic questions.

...

[25(3)] Referred question 3 did raise issues of mixed fact and law but its ultimate determination depended upon how the Court ultimately framed and analysed the question. Some aspects of question 3 were quintessentially matters for the jury. However, the scope and operation of s 5 of the [PA Act], the relationship between s 5 and s 25 of the Act, and the scope and content of police powers and functions "under this Act" (see the text of s 148B of the [PA Act]) raised important questions of law. It was necessary to resolve those matters prior to trial for the trial Judge to instruct the jury about the defence provided by s 148B of the [PA Act]. They were not hypothetical matters.

19. Contrary to the respondent's submission (in addressing the second question, as set out at [1] above)[5] that it could hardly be said there is any material "controversy" of the kind to have this Court intervene, the controversy between the parties about the proper construction of s 148B is likely to be a decisive issue at the respondent's trial. The respondent has indicated that he will rely on s 43BD and s 208E of the Criminal Code and s 148B of the PA Act. The two defences under the Criminal Code involve objective considerations of reasonableness; the protection in s 148B does not (as to "good faith" see Applicant's Reply submissions at [7] and AWS at [72]). If s 148B is construed in accordance with the decision of the Full Court to provide protection for the "core functions" in s 5 of the PA Act, the two defences under the Criminal Code will have little practical significance. More to the point, the jury could acquit the respondent on all charges on an incorrect legal basis, without any recourse to considerations of the reasonableness of his conduct.[6]

20. The applicant submits that if special leave is granted, this Court has jurisdiction to hear the appeal, and that the questions on appeal before this Court, which are based on the assumed facts, are not hypothetical.

PM Strickland SC
Forbes Chambers
Ph: (02) 9390 7777
p.strickland@forbeschambers.com.au

SG Callan SC
12 Wentworth Chambers
(02) 9232 6785
scallan@12thfloor.com.au

S Palaniappan
Sixth Floor Selborne Chambers
Ph: (02) 8915 2613
spalaniappan@sixthfloor.com.au

5 Respondent's note dated 25 October 2021 at [12].

6 The issue for this Court raised in ground 2 is similarly a question of law as to the correct construction and application of s 148B where alternative "purposes" are posited by the respondent (AWS [3]), in order that the jury at the respondent's trial may be properly directed.